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BEFORE THE  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )  
 )  
Reexamination of the Comparative ) MM Docket No. 95-31  
Standards for Noncommercial )  
Educational Applicants )

To: The Commission

COMMENTS OF HOUSTON CHRISTIAN BROADCASTERS, INC.

Houston Christian Broadcasters, Inc. (hereafter "HCBI"), by its undersigned counsel and pursuant to the Commission's FURTHER NOTICE OF PROPOSED RULE MAKING (hereafter the "Notice"), FCC 98-269<sup>1</sup>, in the above captioned proceeding, hereby respectfully submits these comments on the proposed standards for deciding among competing applicants for noncommercial, educational ("NCE") broadcast stations.<sup>2</sup> In summary, HCBI does not believe that the traditional comparative hearing process should be retained. HCBI also believes that a lottery or random selection procedures does not serve the public interest requirements of the Communications Act of 1934, as amended. HCBI favors a point system utilizing criteria that do not give NCE applicants any incentive to engage in comparative "gamesmanship" in connection with

<sup>1</sup> Released October 21, 1998.

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the legal or engineering structure of NCE applications. Moreover, HCBI submits that the Commission lacks the statutory authority to prohibit NCE applicants from applying for non-reserved FM allotments, believes that such an exclusion is contrary to the Commission's policy of increasing the diversity of broadcast voices, and believes there are legally sound and expeditious bases for dealing with competing commercial and NCE applications for such frequencies.

## I. BACKGROUND.

1. HCBI is a non-profit, private educational organization which is recognized by the United States Department of the Treasury as tax exempt under Section 501(c)(3) of the Internal Revenue Code, and which has been found by the Commission to be legally qualified to operate broadcast stations utilizing that portion of the FM band reserved for educational broadcasting. HCBI is the Commission licensee of noncommercial educational broadcast station KKER(FM), Kerrville, Texas, operating in the reserved portion of the FM band. HCBI is the licensee of KHCB(AM), Galveston, Texas and KHCH(AM), Huntsville, Texas, two AM broadcast stations operated on commercial AM frequencies, but licensed for noncommercial, educational operation. HCBI is the licensee of KHCB-FM, Houston, Texas, a station operating<sup>3</sup> in the non-reserved portion of the FM band<sup>4</sup> and licensed to HCBI for noncommercial, educational

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<sup>2</sup> The deadline for filing comments was extended to January 28, 1999, pursuant to the Commission's *Order* in MM Docket No. 95-31, released on December 3, 1998, DA 98-2489.

<sup>3</sup> HCBI has operated KHCB-FM since 1962.

<sup>4</sup> The Commission's FM channel allocation scheme implemented after the enactment of the Communications Act of 1934 reserved twenty channels at the lower end of the FM band for non-commercial, educational broadcasting. See 47 C.F.R. 73.501. The remainder of the FM band, channels

broadcasting. HCBI is the permit holder for a new noncommercial, educational FM station at Wake Village, Texas, KBHA, that will also operate in the non-reserved portion of the FM band, the permit for which was approved by the Commission after a "for-profit" settlement among HCBI and a number of commercial broadcast station applicants. In addition, HCBI operates a noncommercially licensed FM translator on a non-reserved FM band frequency in Bryan, Texas, K265DH, and a noncommercially licensed<sup>5</sup> FM translator on a reserved FM band frequency in San Marcos, Texas, K210DQ. Accordingly, HCBI is familiar from a practical standpoint with the various aspects of noncommercial, educational licensing and broadcasting, both in the reserved and non-reserved portions of the FM band and on AM frequencies.

2. In addition, HCBI is a competing applicant for noncommercial, educational FM stations proposing the use of frequencies in the reserved portion of the FM band at Jefferson, Madisonville, Lufkin, Yoakum, Bryan, Bloomington and Fredericksburg, Texas. HCBI is the sole noncommercial, educational applicant among a group of competing applications for the use of a non-reserved FM channel at Thorndale, Texas. Thus, HCBI is well aware of the complications inherent in situations involving competing applications for reserved band, educational FM channels, and involving non-reserved FM channels with a mix of commercial and educational applicants. HCBI

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221-300, is "non-reserved" and the channels and may be utilized for commercial or non-commercial broadcast operation. These channels are often erroneously described as the "commercial band", including by the Commission in the Notice. However, the use of FM channels 221-300 has never been limited to commercial, for profit operation, and this designation is factually and historically inappropriate.

<sup>5</sup> The license application is presently pending before the Commission.

hopes that its experiences over the past 37 years as a noncommercial, educational broadcast licensee will assist the Commission in its deliberations on proposed changes in the process utilized in selecting among competing applicants for noncommercial, educational broadcast stations, on reserved and non-reserved channels.

## II. DISCUSSION

### A. PROCEDURES ON RESERVED NCE SPECTRUM.

#### Comparative Hearings.

3. HCBI agrees with the tentative conclusions of the Commission on the lack of merit in continuing the use of the traditional comparative hearing process in deciding among competing applicants for NCE frequencies. The comparative hearing process is inordinately time consuming and expensive for the applicants, uses a great deal of the Commission's resources, and has typically resulted in a time sharing arrangement that is not realistically feasible for, or acceptable to, the applicants. In sum, there is little to recommend in this process for the parties, the Commission, or the public interest. However, while an economy of resources and an expeditious decision process are beneficial to all parties involved in a proceeding to decide among conflicting NCE applications, the Commission has a duty under the Communications Act of 1934, as amended, (hereafter the "Act") to not sacrifice a reasoned decision based on the traditional public interest standards with which it is charged at the altar of quick and inexpensive processing.

### Lotteries.

4. In the Balanced Budget Act of 1997, the Congress affirmed the authority of the Commission to use lotteries as a method for resolving competing applications for NCE spectrum. However, Section 309 of the Act does not require, or express a preference for, the use of random selection methods by the Commission in determining among competing applicants for NCE facilities. While lotteries have the advantage of allowing for a quick, less expensive decision than other methods, any lottery is a method of random selection based solely on chance, not relative merit. Random chance simply does not allow the Commission to review and decide among competing NCE applicants based on the relative merits of their competing applications, as is mandated by Congress under the public interest standards of Sections 309(a) and 307(b) of the Act. As the Commission has found in the past in connection with lottery proposals for full-service broadcast stations, any potential gains in efficiency that may be realized by the use of random selection are significantly outweighed by the high probability that there will be a corresponding decrease in the quality of broadcast licensees and service to the public.<sup>6</sup>

5. The Notice recognizes this obvious shortcoming and attempts to address in with a proposal for “weighing” lotteries through preferences based on certain “meritorious” criteria that can be claimed by applicants in order to “increase their chances” of selection. While these enhancements may render a lottery somewhat less

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<sup>6</sup> *Random Selection of Broadcast Applicants*, 67 RR 2d 644 (1990).

arbitrary, the problematical reality is that any process involving a determination based on any form of random selection will always be arbitrary and subject to the selection of less qualified NCE applicants. HCBI does not believe that the public interest mandate of the Act can be met in a decision-making process that is as heavily weighted by randomness as it is by applicant merit.

Point System.

6. The point system proposal for comparative decision-making has the benefits of being objectively based, inexpensive to utilize, and flexible enough to allow for a relatively prompt resolution among diverse applicant groups. Most importantly, a point system contemplates a comparative analysis that results in the “winner” being the applicant who proposes the most meritorious use of the rapidly depleting NCE spectrum. Simply stated, a point system will allow for the selection of the best-qualified applicant, not subject to “luck”, and clearly furthers the public interest mandate of the Act. However, the Commission must be careful in determining the various criteria to which it may accord merit points in connection with such a system, or this process becomes as arbitrary as a lottery.

7. The Commission must be aware that while certain characteristics of an applicant group may seem meritorious and deserving of enhancement points or “credits”, only those characteristics that are not subject to immediate evisceration as soon as a decision has been made should actually be accorded such credits. For example, the Commission’s Notice proposes “minority control credit” for applicants

controlled both de jure and de facto by minorities, and a “local educational presence credit” for applicants whose boards are made up of local citizens in the proposed community of license. HCBI’s experience has been that membership on the boards of non-profit corporations and organizations is ephemeral and subject to constant changes as members leave the board and/or are replaced by others. There is no certainty that a minority or locally controlled non-profit organization seeking a NCE license will continue to be a minority or locally controlled entity after the license is approved by the Commission. One need only review the recent history of the Commission’s well-intentioned policy of affording dispositive minority comparative credits in commercial broadcast comparative hearings to see applicants that were “minority controlled” during the FCC hearing phase, but which suddenly became devoid of minority participation once the spotlight of the adjudicatory process turned off, and the grant of the minority-enhanced application became a “final order.” Moreover, as the Notice recognizes, the Commission is not required to include minority or local participation as enhancing factors in a point system under the Congressional mandate in the enabling statute, the Budget Reform Act of 1997.<sup>7</sup>

8. The proposal in the Notice for a “local diversity” credit based on an applicant’s proposed station not having contour overlap with the principal community contour of any commonly controlled broadcast station suffers from the same infirmity.

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<sup>7</sup> The Commission has long recognized that minority ownership is not an element that can be considered in a Section 307(b) analysis of whether one applicant should be given a dispositive preference over another based on a more efficient use of the available broadcast spectrum. *See, Valley Broadcasters, Inc.*, 67 RR 2d 937 (1990).

At first blush, the idea would seem to have merit in fostering broadcast diversity of ownership by penalizing a NCE applicant seeking a second NCE station in an area already served its existing station. However, it is a simple matter for a NCE applicant to configure the proposed service contours in a NCE application to avoid such overlap, and then to modify the proposal once a construction permit has been issued by the Commission based on such a "credit" to specify a new coverage pattern that would not have allowed it to qualify for this comparative enhancement.<sup>8</sup>

9. HCBI submits that comparative credits based on such easily modified criteria are an incentive for applicants to "play the comparative enhancement game" and to submit NCE applications intended solely to gain an advantage from such standards for comparative purposes, but without the serious intention of following through on these points once the comparative victory is won. The Commission's experience in the commercial broadcast hearing arena has also shown that it lacks the resources to police post-grant applicants and to fully ensure that they live up to their previous comparative promises. Such disincentives for applicants to act truthfully and in full candor with the Commission in the context of NCE applications thereby should be avoided in formulating the comparative criteria to be utilized in deciding among such applicants.

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<sup>8</sup> Moreover, the Commission has previously found that since noncommercial educational channels are reserved for nonprofit, educational organizations so that such organizations may advance their educational goals and objectives, the ownership of other NCE stations by the applicant is "irrelevant" to a determination of which of two or more mutually exclusive noncommercial applicants would best serve the public interest, convenience and necessity under the Act. *Real Life Educational Foundation of Baton Rouge, Inc.*, 69 RR 2d 1043 (1991).



HCBI would suggest the following comparative enhancements for a comparative NCE application point system adjudication process.

"FIRST APPLICANT" CREDIT.

10. Section 73.202(b)<sup>9</sup> of the Commission's Rules and Regulations that requires the allotment of non-reserved FM channels to specific communities before applications will be accepted for the use of those frequencies. NCE FM channels are available for use in any community where such a use will comply with the technical requirements in Section 73.501, Et. Seq., of the Commission's Rules. This latter procedure requires applicants for new NCE-FM stations to undertake an extensive, and expensive, engineering and legal effort to find frequencies that are available for use in a community that they wish to serve through the operation of a NCE station. Under the Commission's current NCE-FM application processing procedures<sup>10</sup>, once an applicant finds such a NCE channel it prepares and submits the necessary application for a construction permit to operate a NCE-FM station thereon. If the application is deemed acceptable for filing by the Commission's staff, a Public Notice is issued announcing a date on which the application will be available and ready for final processing, unless mutually-exclusive applications are filed on or prior to that date. It is normally the release of these "Cut-off lists" that trigger the filing of competing applications by the "cut-off date", or the deadline for the filing of mutually exclusive applications. At present, the original applicant receives no credit for its pioneering efforts in finding the

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<sup>9</sup> 47 C.F.R. 73.202(b).

NCE channel and preparing the initial application specifying this new NCE-FM station. Rather, the pioneering efforts of the applicant are typically rewarded instead by the filing of numerous "me too", mutually-exclusive applications for the channel that are based on the original applicant's hard work, effort and expenses in finding the NCE-FM channel. Many conflicting applications are often filed for the purposes of delaying the implementation of the new station by an existing NCE broadcaster in the area, or in the hope of effectuating a settlement with the lead applicant.<sup>11</sup> HCBI submits that the first applicant, based on the application filing date, in a group of competing applications should be accorded a merit point for its pioneering efforts in this regard. Such a merit point serves the public interest by encouraging qualified NCE-FM applicants to utilize available NCE-FM channels and thereby increase the diversity of NCE radio service provided to the American people.

11. The Commission's Notice indicates that National Public Radio is concerned that such a "finder's preference" could result in a "land rush" for noncommercial frequencies. The Commission expresses the opinion that such an outcome "...would be undesirable because it could create an artificial demand to apply for such frequencies prematurely and prevent future upgrades by existing licensees." When did the

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<sup>10</sup> 47 C.F.R. 73.3573.

<sup>11</sup> As the Commission's records reflect, an entity calling itself Broadcasting For The Challenged presently has over 100 applications on file with the Commission for new NCE stations to serve communities throughout the United States. To date, BFTC has yet to have an application for a NCE station approved by the Commission. As the Commission's records indicate, BFTC has never submitted a "lead" application for a NCE station, but exclusively files competing applications against NCE FM applications in response to cut-off lists issued by the Commission. BFTC's motives for continually utilizing this approach, knowing it is committing itself to a NCE-FM application "conflict", are not altogether clear.

Congress notify the Commission that it was in the public interest to “warehouse” NCE-FM frequencies for the future use of National Public Radio or any other entity? What court of competent jurisdiction found under Section 307(b) of the Communications Act that it was in the public interest for the NCE-FM spectrum to lie fallow, rather than be utilized to serve the public? And when did the Commission determine that its mandate was to protect the ability of existing NCE-FM broadcasters to upgrade their facilities over the desire of qualified NCE-FM applicant groups to seek authorizations for new NCE-FM voices? The Commission’s Notice references nothing in support for its position that pioneer preferences, or first applicant merit points, are not in the public interest. HCBI submits that any incentives for qualified NCE-FM applicants to utilize available channels, and provide new NCE-FM service throughout the United States, is inherently in the public interest and should be a basis for a comparative merit credit in a NCE point system.

12. Moreover, the Commission has recognized this factor as a valid basis for assigning comparative decision-making credit in the broadcast services. Under section 74.1233(d)<sup>12</sup> of the Commission’s Rules and Regulations, conflicts between FM translator applications are resolved based on a list of three “priorities”. In the event of a tie, a dispositive credit is given on a “first-come/first served” basis. HCBI submits that the Commission in deciding among competing NCE full-service applicants should adopt a “first-come/one credit point” criterion.

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<sup>12</sup> See, 47 C.F.R. 73.74.1233(d) and (g).

13. In the case of a tie between competing NCE applicants, HCBI believes that a merit point for being the "pioneer" applicant should be the deciding factor. Where there is a tie that does not include the "pioneer" applicant, the deciding criteria should be the earliest application filing date among the applicants in contention.

PAST NCE BROADCAST RECORD.

14. HCBI submits that one point should be given to NCE applicants who can show a record of NCE broadcast station operation and service to the public for a period of at least ten (10) years prior to the filing date of its application. Such a credit should only be accorded to NCE licensees who can also show that their ten year or greater term of NCE broadcast station operation is untainted by fines, forfeitures or admonitions from the Commission in response to violations of the NCE broadcast rules.

15. The Commission has long recognized that the past broadcasting record of an applicant for a broadcast license is the "most reliable gauge" of the service that can be expected in the future.<sup>12</sup> This finding has been upheld as a valid criterion for judging the merits of an application under the public interest standard in the Act by the federal courts.<sup>13</sup> Unfortunately, however, the growth of interest in NCE station operation by non-profit, educational entities has resulted increasingly in violations of the Commission's rules limiting such operation to a "non-commercial" basis. See, Letter to Agape Broadcasting Foundation, KNON-FM (DA 98-825), released May 1, 1998 and the

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<sup>12</sup> See, *Wabash Valley Broadcasting Corporation*, 1 RR 2d 573 (1963) and *Policy Statement on Comparative Hearings Involving Regular Renewal Applicants*, 18 RR 2d 1901 (1970).

<sup>13</sup> *Central Florida Enterprises, Inc. v. FCC*, 683 F. 2d 503 (1982).

cases cited therein. HCBI submits that any applicant who can demonstrate a substantial and untarnished record of NCE broadcast station operation should be accorded one merit point inasmuch as this record is the "most reliable gauge" that it will better serve the public interest in its operation of the new NCE station than other competing applicants with no proven "track record" of service, or other NCE licensees who are unable to operate in compliance with the Commission's NCE rules and policies.

#### COMPARATIVE COVERAGE.

16. HCBI agrees that NCE applicants who will more broadly serve the public should receive one merit point. This point should be given among competing applications to an applicant whose proposed facility will provide service within its 60 dBu contour that is at least 10% greater than the service area of each of the other applicants.

#### EDUCATIONAL INSTITUTIONS AND STATE NETWORKS.

17. Section 73.503 of the Commission's rules does not require that a NCE applicant be an accredited state, regional, or national educational organization.<sup>14</sup> Nor does it require that such applicants be part of a "state-wide plan" for NCE broadcasting. In the past, the Commission has never given a comparative benefit to a NCE applicant based on its status as an educational institution, accredited or otherwise, or as a member of a state organized network or plan. The reason for this fact is clear. There is no statutory basis for according such a credit under any provisions of the Act. The

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<sup>14</sup> C.f. *Lower Cape Communications, Inc.*, 47 RR 2d 1577 (1980).

Commission's Notice does not indicate that the Congress has mandated, or authorized, such a credit to be given in the comparative consideration of NCE applications in connection with the Tax Reform Act of 1997. Accordingly, HCBI submits that there is no basis for the Commission allowing educational institutions or applicants who claim to be part of a state or municipal educational broadcasting "plan" to receive a merit point in connection with a point system in deciding among competing NCE applications.

B. BASIC ELIGIBILITY SHOWING.

18. As discussed in the Commission's Notice, there are a wide variety of entities that may be eligible to apply for reserved-band, NCE channels. Applicants must demonstrate that they meet basic eligibility requirements as contained in the Commission's rules.<sup>15</sup> The Notice indicates that the Commission does not propose to change these rules in the context of this rule making proceeding. While HCBI does not believe that changes in the NCE rules are necessary, it would encourage the Commission to take steps to better ensure that applicants for NCE spectrum demonstrate at the time their applications are filed with the Commission that they are qualified to hold licenses to operate thereon.<sup>16</sup> This can be demonstrated by the submission of two types of documentation with a NCE broadcast station application. First, the Commission should require applicants for new NCE stations to submit with

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<sup>15</sup> See, 47 C.F. R. 73.205 and 73.606.

<sup>16</sup> Existing NCE licensees have previously proven their qualification and should be merely required to certify their continued eligibility.

their applications certificates showing that they are non-profit entities in good standing in the state in which they propose to operate the NCE station. In addition, NCE applicants should be required to submit copies of a written finding from the United States Department of the Treasury, Internal Revenue Service, that they have been determined to be either non-profit corporations, organizations or foundations meeting the standards for exemption from taxation under the Internal Revenue Code.

Currently, the submission of this documentation is required for a finding by the Commission that a licensee or applicant is exempt from the payment of regulatory fees. See, 47 C.F.R. 1.1162(c) and the Commission's Public Notice "Verification of Exemption From Regulatory Fees Based on Non-Profit Status", DA 97-2507 (released November 28, 1997). The Commission should, therefore, require NCE FM applicants for new stations to submit this showing in connection with their fee-exempt, NCE applications to establish not only their fee-exempt status, but also their *bona fides* to apply for a NCE broadcast station.

### C. HOLDING PERIOD FOR NCE LICENSES.

19. HCBI supports the Commission's proposal to implement a minimum holding period for NCE licenses awarded on the basis of a point system. HCBI believes that such a policy will discourage speculators in NCE licenses who have no interest in serving the public through the operation of a NCE station. HCBI would support a holding period of anywhere between three to five years. However, HCBI believes that NCE licensees holding licenses issued pursuant to a point system should be allowed to

donate such licenses to another non-profit, educational entity at any time. Such a donation, subject to the prior approval of the Commission, should only be allowed upon the certification by the parties that no consideration would change hands as part of, or in connection with, the donation. A donation without consideration to another non-profit, educational entity does not encourage speculation in NCE licenses and should, therefore, be an exception to the holding period policy.

D. NONCOMMERCIAL EDUCATIONAL APPLICANTS ON "COMMERCIAL" FREQUENCIES.

(1) Preference Based on Availability of Alternative Channels.

20. As noted previously, neither the Act nor the Commission's rules reserve any portion of the broadcast spectrum exclusively for the use of for-profit, commercial licensees. Accordingly, the Commission lacks statutory authority to preclude NCE applicants from submitting applications to utilize non-reserved FM channels or AM frequencies. Presumably Congress would have implemented such a restriction in connection with the Tax Reform Act of 1997 had the competitive bidding limitation to commercial broadcast applications adopted therein been intended to prompt the Commission to label NCE applications "ineligible" to apply for non-reserved channels. It did not do so. The intent of Congress is therefore clear. The restriction on competitive bidding authority to situations involving only commercial broadcast applicants, without a corresponding restriction on NCE applications applying for non-reserved channels, was not intended to prompt the Commission to change its current policy of allowing both commercial and NCE applicants to apply for non-reserved



channels. Moreover, it is entirely inconsistent with the Commission's long-standing policy, as enunciated in the Notice, of encouraging the "inclusion" of diverse groups, including minorities, in broadcasting to adopt a policy of "exclusion" when it comes to non-profit, noncommercial applicants desiring to use non-reserved band FM channels.

21. In cases in which there are both commercial and NCE applicants for non-reserved channels, HCBI submits that the NCE applicants should be given a preference if it can be shown that there are no reserved NCE frequencies available that will allow a NCE licensee to serve the community to which the non-reserved channel is assigned with a 70 d/b/u service contour. In this case, the commercial applications should be dismissed, and any competing NCE applications should be processed pursuant to the NCE procedures adopted herein. On the other hand, if it can be shown that there are reserved-band, NCE frequencies available for use that will allow for coverage over the community of license with a 70 d/B/u contour, the NCE applications should be dismissed in favor of an auction among the commercial applicants. This procedure will allow for either commercial or NCE use of a non-reserved channel depending on whether there is a NCE alternative. Moreover, such a procedure renders the current process of having non-reserved channels allocated for NCE use in a rule making proceeding unnecessary, since a non-reserved channel can be allocated to a community where there are no NCE channels available for use with a preference accruing to any the NCE applicants who may apply over any commercial applicants.

(2) Alternative Non-Reserved FM Assignments For NCE Applicants-The HCBI Thorndale, Texas FM Rule Making Proposal.

22. As noted previously, HCBI is a NCE applicant for the non-reserved FM channel 257A allotment to Thorndale, Texas.<sup>17</sup> There are five (5) other applicants proposing to utilize this allotment, all of them proposing commercial FM broadcast stations. Due to the "mix" of NCE and commercial applicants, it does not appear that the Commission has authority to resolve the proceeding through the use of the competitive bidding procedures recently implemented by the Commission in the *Competitive Bidding Order*.<sup>18</sup> However, on November 30, 1998, HCBI filed a "Petition For Rule Making" with the Commission asking that an alternative non-reserved channel, 286A, be allocated to Thorndale and reserved for NCE use. HCBI also requests that it be allowed to amend its NCE application to channel 257A to specify the use of the proposed channel 286A\* assignment without losing its "cut-off" protection and allowing for the filing of competing applications. HCBI believes that this proposal serves the public interest in that it will allow for a first NCE service to Thorndale, Texas, and allow for the Commission to hold an auction among the competing commercial FM applicants and expedite the implementation of a first local commercial FM service to the

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<sup>17</sup> See, FCC File BPED-970911MA.

<sup>18</sup> See, *Implementation of Section 309(j) of the Communications Act – Competitive Bidding For Commercial Broadcast and Instructional Television Fixed Service Licenses*, FCC 98-194 (released August 18, 1998).

community of Thorndale. No action has been taken by the Commission's staff on the HCBI proposal as of this date.<sup>19</sup>

23. HCBI submits that its proposal in the Thorndale, Texas proceeding should be adopted by the Commission as a means for resolving situations in which there is such a mix of NCE and commercial applicants. The Commission should ascertain whether there is an alternative, non-reserved FM channel available for use in the community for which the competing applications have been filed. In the event there is an alternative channel, the Commission should allocate it to that community, reserve the use thereof for NCE operation, amend the NCE application to specify that channel, and hold an auction among the commercial applicants. In the event there is more than one NCE application, the decision among them would be based on the procedures that will be implemented in the context of this proceeding, i.e., lottery, point system, etc.

24. A possible combination of HCBI's proposal in (1) and (2) is for the Commission to first find a reserved NCE FM frequency for the NCE applicants to utilize, and require them to amend their applications to specify that frequency in lieu of the non-reserved FM channel. The Commission can then hold an auction among the commercial applicants and resolve the competing NCE applications based on the procedures adopted in this proceeding. In the event there are no reserved NCE FM frequencies available as an alternative, the Commission could move to the second step

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<sup>19</sup> This proposal is consistent with the Commission's policy of finding alternative non-reserved FM assignment to resolve conflicting application proceedings. *C.f. Point Arena, California*, DA 98-1203 (released June 26, 1998), and the cases cited therein.

of finding an alternative non-reserved FM frequency, as noted above. In the event there were no alternative NCE or non-reserved channels, the NCE applicants would receive a preference, the commercial applications would be dismissed, and the conflict between the NCE applications would be resolved by the procedures implemented herein.<sup>20</sup>

E. SECTION 307(b) CONSIDERATIONS.

25. While reexamining the comparative standards for NCE applications, the Commission must not lose sight of the requirements of Section 307(b) of the Act. That section provides, in pertinent part:

In considering applications for licenses, and modifications and renewals thereof, when and insofar as there is demand for the same, the Commission shall make such distributions of licenses, frequencies, hours of operation, and of power among the several States and communities as to provide a fair, efficient, and equitable distribution of radio service to each of the same.

As the Commission has consistently found in the past, where applicants for conflicting NCE channels propose to serve different communities and areas, it must determine which of the proposals would best provide a fair, efficient, and equitable distribution of radio service. If the Commission can make a determination under Section 307(b) favoring one community over another then "only applicants specifying the favored community" are to be given comparative consideration. *Valley Broadcasters, Inc.*, 67 RR

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<sup>20</sup> HCBI's application for a reserved-band NCE channel in Lufkin, Texas is mutually exclusive with another application. On September 21, 1998, HCBI filed comments in a rule making proceeding, MM Docket No. 98-135, proposing the assignment of non-reserved FM channel 261A to Lufkin, Texas, and requested that the channel be assigned for NCE use and that HCBI be allowed to amend its application to specify the use of that channel without losing its cut-off protection, in order to resolve the NCE application conflict. At the time these comments were filed, there was rule making pending to assign another non-reserved FM channel, 230A, to Lufkin, and HCBI questioned the need to assign two non-reserved channels when there is an increasing demand for NCE facilities for that community. Lufkin

2d 937 (1990). Noncommercial, educational radio stations are to be considered in a Section 307(b) analysis, and conflicting applications for NCE-FM stations involving different communities of license require, before any comparative analysis based on individual merit or “bonus points”, a determination whether one applicant should be granted on the basis of a dispositive Section 307(b) preference.

26. The Commission’s Notice seems to indicate that in connection with the comparative consideration of NCE applicants its Section 307(b) mandate can be reduced to the level of a lottery or point system enhancement. See, Notice at page 12, paragraph 21(B). However, where two or more NCE-FM applicants file conflicting applications proposing to serve different communities of license, the Commission must first make a determination under Section 307(b) of the Act whether one application should be approved based on the greater need for the use of the NCE-FM channel in that community. This determination must be made before the Commission undertakes the more mundane analysis of counting up points. Nothing in the enabling language in the Tax Reform Act of 1997 excuses the Commission from this obligation.

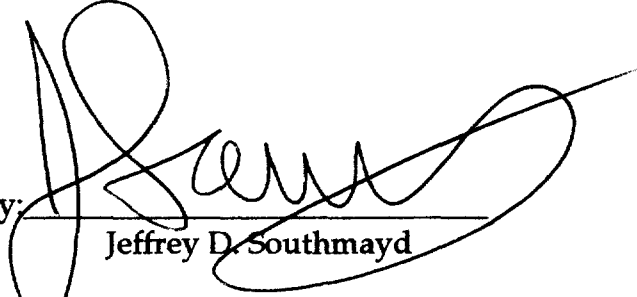
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presently being served by two stations on non-reserved FM channel allotments and two NCE FM stations.

WHEREFORE, Houston Christian Broadcasters, Inc. respectfully submits these comments to assist the Commission in formulating a legal and equitable basis for choosing among competing NCE applications.

Respectfully submitted,

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